

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DONALD W. LIETZKE JR.
Claimant

VS.

**TRU-CIRCLE AEROSPACE
TECT AEROSPACE**
Respondents

AND

**GREAT NORTHERN INS. CO.
ZURICH AMERICAN INS. CO.**
Insurance Carriers

Docket No. 1,020,992

ORDER

Tru-Circle Aerospace (Tru-Circle) and its insurance carrier, Great Northern Insurance Co., request review of the May 3, 2005 preliminary hearing Order entered by Administrative Law Judge John D. Clark.

ISSUES

It was undisputed the claimant suffered accidental injury to his right hip on March 18, 2004, while working for Tru-Circle. Tru-Circle was purchased by Tect Aerospace on October 18, 2004, and claimant continued working for the successor owner. Claimant later amended his application for hearing to allege he suffered injury not only on March 18, 2004, but also each and every day worked thereafter.

Following a preliminary hearing, the Administrative Law Judge (ALJ) ordered that claimant be provided a list of three physicians from which claimant would select the treating physician. The ALJ further ordered that claimant was to be provided temporary total disability compensation if taken off work. The ALJ specifically ordered all benefits be assessed against Tru-Circle and its insurance carrier.

The respondent, Tru-Circle, requests review of whether the claimant's current complaints and need for medical treatment arose out of and in the course of employment

with Tru-Circle or whether they are the result of an intervening accident suffered in claimant's subsequent employment with Tect Aerospace (Tect).

Tect argues that because it is a successor owner of Tru-Circle the dispute in this case is analogous to a dispute between successive insurance carriers for a single respondent. Respondent notes the Board has determined such disputes between insurance carriers does not raise a jurisdictional issue for review from a preliminary order. Consequently, Tect argues the Board does not have jurisdiction to review this appeal. In the alternative, Tect argues the evidentiary record supports the ALJ's determination that claimant's current need for treatment is a natural consequence of the slip and fall on March 18, 2004.

The issues on appeal are whether the Board has jurisdiction to review the preliminary order and, if so, whether claimant's need for additional medical treatment was the direct result of a work-related accident with Tru-Circle or an intervening subsequent injury while working for Tect.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

Initially, respondent, Tect, argues the Board does not have jurisdiction to consider this appeal. Tect describes the appeal as a dispute between insurance carriers. The Board disagrees with Tect's contention. This claim involves different employers, not two insurance carriers for the same employer.

An ALJ's preliminary award under K.S.A. 44-534a is not subject to review by the Board unless it is alleged that the ALJ exceeded his or her jurisdiction in granting the preliminary hearing benefits.¹ "A finding with regard to a disputed issue of whether the employee suffered an accidental injury, [and] whether the injury arose out of and in the course of the employee's employment . . . shall be considered jurisdictional, and subject to review by the board."² Whether claimant's condition and present need for medical treatment is due to the admitted work-related accident while employed for Tru-Circle or whether claimant suffered an intervening injury while employed by Tect gives rise to an issue of whether claimant's current condition arose out of and in the course of his employment with Tru-Circle. This issue is jurisdictional and may be reviewed by the Board on an appeal from a preliminary hearing order.

¹ K.S.A. 2003 Supp. 44-551(b)(2)(A).

² K.S.A. 44-534a(a)(2).

It was undisputed claimant suffered an injury to his right hip on March 18, 2004, while working for Tru-Circle. Claimant slipped on some coolant and did the splits but caught himself before falling onto the ground. When his feet slipped from under him claimant heard a popping sound and within an hour or two he began to experience tenderness as well as stiffness in his right hip.

Claimant was provided medical treatment with Dr. Merrill Thomas and noted that by the end of May 2004 his hip was improved but that he continued to experience dull pain. But at that time claimant was performing more sit down work. Claimant was released from further treatment.

In mid-July the claimant's work changed and he was required to stand more which resulted in a flare-up of his hip pain. Claimant was provided additional physical therapy and in August 2004 he received an epidural injection for a preexisting back problem unrelated to this case. Claimant believed the epidural injection masked the pain in his hip. In August 2004 the claimant was again released from treatment by Dr. Thomas and returned to his regular job duties. It should be noted that apparently objective diagnostic tests such as x-rays or an MRI were not performed during the treatment claimant received from Dr. Thomas.

After the change in ownership in October 2004, the claimant was assigned to a new project which required claimant stand to weld and also required claimant to perform more physical activities. The claimant testified that by mid-November he started to get the same sensations in his right hip. Claimant was apparently referred to Dr. Philip R. Mills for an evaluation. Dr. Mills diagnosed claimant with right groin and medial thigh pain and ordered an MRI to rule out hip versus back pathology. Dr. Mills opined that there was a causal relationship between claimant's current complaints and the accidental injury on March 18, 2004.

The MRI performed on November 29, 2004, showed mild lateral subluxation of the right femoral head, irregularity and probably a hip fracture involving the anterior superior aspect of the right acetabulum and articular cartilage. After reviewing the results of the MRI, Dr. Mills recommended claimant have an orthopedic evaluation.

The claimant was then referred to Dr. Pat D. Do for evaluation on January 25, 2005. The doctor opined claimant's hip pain was due to osteoarthritis which had been aggravated by his work-related incident. But Dr. Do concluded claimant was at maximum medical improvement. According to claimant, the doctor did not review the MRI results.

At his attorney's request, the claimant was examined by Dr. George G. Flutter on February 23, 2005. Dr. Flutter opined that there was a causal relationship between claimant's current pain complaints and his accidental injury on March 18, 2004. Dr. Flutter recommended claimant have an additional orthopedic evaluation to determine what additional treatment would be appropriate.

In general, the question of whether the worsening of claimant's preexisting condition is compensable as a new, separate and distinct accidental injury under workers compensation turns on whether claimant's subsequent work activity with Tect aggravated, accelerated or intensified the underlying disease or affliction.³

Every direct and natural consequence that flows from a compensable injury, including a new and distinct injury, is also compensable under the Workers Compensation Act. In *Jackson*⁴, the Court held:

When a primary injury under the Workmen's Compensation Act is shown to have arisen out of the course of employment every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury. (Syllabus 1).

But the *Jackson* rule does not apply to new and separate accidental injuries. In *Stockman*⁵, the Court attempted to clarify the rule:

The rule in *Jackson* is limited to the results of one accidental injury. The rule was not intended to apply to a new and separate accidental injury such as occurred in the instant case. The rule in *Jackson* would apply to a situation where a claimant's disability gradually increased from a primary accidental injury, but not when the increased disability resulted from a new and separate accident.

In *Stockman*, claimant suffered a compensable back injury while at work. The day after being released to return to work, the claimant injured his back while moving a tire at home. The *Stockman* court found this to be a new and separate accident.

In *Gillig*⁶, the claimant injured his knee in January 1973. There was no dispute that the original injury was compensable under the Workers Compensation Act. In March 1975, while working on his farm, the claimant twisted his knee as he stepped down from a tractor. Later, while watching television, the claimant's knee locked up on him. He underwent an additional surgery. The district court in *Gillig* found that the original injury was responsible for the surgery in 1975. This holding was upheld by the Kansas Supreme Court.

³ See *Boutwell v. Domino's Pizza*, 25 Kan. App. 2d 110, 959 P.2d 469, rev. denied 265 Kan. 884 (1998).

⁴ *Jackson v. Stevens Well Service*, 208 Kan. 637, 493 P.2d 264 (1972).

⁵ *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 263, 505 P.2d 697 (1973).

⁶ *Gillig v. Cities Service Gas Co.*, 222 Kan. 369, 564 P.2d 548 (1977).

In *Graber*⁷, the Kansas Court of Appeals was asked to reconcile *Gillig* and *Stockman*. It did so by noting that *Gillig* involved a torn knee cartilage which had never properly healed. *Stockman*, on the other hand, involved a distinct reinjury of a back sprain that had subsided. The court, in *Graber*, found that its claimant had suffered a new injury, which was “a distinct trauma-inducing event out of the ordinary pattern of life and not a mere aggravation of a weakened back.”

Here, the Board finds this circumstance to be more akin to that found in *Gillig*, rather than *Stockman*. Claimant’s right hip condition would improve when he limited his standing but was still painful and never completely resolved. Although claimant had been released to regular duties by the company physician he still had dull pain in his hip and the pain returned with increased physical activity. Moreover, Drs. Mills and Flutter both opined that claimant’s current condition is causally related to his accidental injury suffered on March 18, 2004, while working for Tru-Circle.

In situations such as this, there is often a very fine line between what would be described as a new and separate accidental injury versus a natural consequence of the original injury. In this instance, based upon the record compiled to date, the Board finds that claimant’s condition did arise out of his employment and is a natural consequence of the original injury on March 18, 2004, with respondent Tru-Circle. Accordingly, the Board affirms the ALJ’s Order.

WHEREFORE, it is the finding of the Board that the Order of Administrative Law Judge John D. Clark dated May 3, 2005, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of July 2005.

BOARD MEMBER

c: Dale V. Slape, Attorney for Claimant
Jeff S. Bloskey, Attorney for Tru-Circle and Great Northern Ins. Co.
Douglas C. Hobbs, Attorney for Tect and Zurich American Ins. Co.
John D. Clark, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

⁷ *Graber v. Crossroads Cooperative Ass’n*, 7 Kan. App. 2d 726, 648 P.2d 265, rev. denied 231 Kan. 800 (1982).